Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

AMERICAN LUNG ASSOCIATION,

Petitioner,

v.

AMERICAN TRUCKING ASSOCIATIONS, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that the Clean Air Act provisions governing national ambient air quality standards, and the Environmental Protection Agency's interpretation of those provisions, represent an unconstitutional delegation of legislative authority.

2. Whether the court of appeals erred in calling into question the Environmental Protection Agency's authority to implement new, more health-protective national ambient air quality standards for ozone.

RULE 29.6 DISCLOSURE, AND LIST OF PARTIES BELOW

Petitioner American Lung Association (ALA) was an intervenor in the court of appeals. ALA has no parent companies or nonwholly owned subsidiaries, and there is no parent or publicly held company owning 10% or more of ALA's stock.

The following were parties in one or both of the two consolidated proceedings addressed by this petition for certiorari (*American Trucking Assns. v. USEPA*, D.C. Cir. No. 97-1440 and consolidated cases; and *American Trucking Assns. v. USEPA*, D.C. Cir. No. 97-1441 and consolidated cases):

Alliance of Automobile Manufacturers (formerly American Automobile Manufacturers Association)
American Farm Bureau Federation
American Forest & Paper Association
American Iron and Steel Institute
American Lung Association
American Petroleum Institute
American Portland Cement Alliance
American Public Power Association
American Road and Transportation Builders Association
American Trucking Associations, Inc.
Appalachian Power Company
Atlantic City Electric Company
Baltimore Gas and Electric Company
James Bassage
Burns Motor Freight, Inc.
Carolina Power & Light Company
Centerior Energy Corporation
Central and South West Services, Inc.
Central Hudson Gas & Electric Corporation
Central Illinois Light Company

RULE 29.6 DISCLOSURE, AND LIST OF PARTIES BELOW – Continued

Central Illinois Public Service Company
Central Power and Light Company
Chamber of Commerce of the United States
Chemical Manufacturers Association
CINergy Corporation
Citizens for Balanced Transportation
Cleveland Electric Illuminating Company
Columbus Southern Power Company
ComEd Company
Consumers Energy Company
Dayton Power & Light Company
Delmarva Power & Light Company
Detroit Edison Company
Duke Energy Company
Duquesne Light Company
Edison Electric Institute
Equipment Manufacturers Institute
FirstEnergy Corporation (A merger of Centerior Energy Corporation and Ohio Edison Company)
Florida Power Corporation
Garner Trucking, Inc.
Genie Trucking Line, Inc.
Gloucester Company, Inc.
Michael Gregory
Idaho Mining Association
Illinois Power Company
Indiana Michigan Power Company
Indianapolis Power & Light Company
Jacksonville Electric Authority
Judy's Bakery, Inc.
Kansas City Power & Light Company
Kennecott Energy and Coal Company
Kennecott Holdings Corporation
Kennecott Services Company
Kentucky Power Company

RULE 29.6 DISCLOSURE, AND LIST OF PARTIES BELOW – Continued

Kentucky Utilities Company
Louisville Gas and Electric Company
Madison Gas and Electric Company
Commonwealth of Massachusetts
David Matusow
Brian McCarthy
Meridian Gold Company
State of Michigan
Midwest Ozone Group
Minnesota Power
Monongahela Power Company
Montaup Electric Company
National Association of Home Builders
National Association of Manufacturers
National Automobile Dealers Association
National Coalition of Petroleum Retailers
National Indian Business Association
National Mining Association
National Paint and Coatings Association
National Petrochemical & Refiners Association
National Rural Electric Cooperative Association
National Small Business United
National Stone Association
Nevada Mining Association
State of New Jersey
Newmont Gold Company
Niagara Mohawk Power Corporation
Non-Ferrous Founders' Society
Northern Indiana Public Service Company
Oglethorpe Power Corporation
State of Ohio
Ohio Edison Company
Ohio Mining and Reclamation Association
Ohio Power Company
Ohio Valley Electric Corporation

RULE 29.6 DISCLOSURE, AND LIST OF PARTIES BELOW – Continued

Oklahoma Gas & Electric Company
Otter Tail Power Company
PacifiCorp
Pennsylvania Power & Light Company
Phoenix Cement Company
Plains Electric Generation & Transmission Cooperative, Inc.
Potomac Edison Company
Potomac Electric Power Company
PP&L Resources
Public Service Company of New Mexico
Public Service Company of Oklahoma
Richard Romero
Salt River Project Agricultural Improvement and Power District
Small Business Survival Committee
South Carolina Electric & Gas Company
Southern Company
Southwestern Electric Power Company
Tampa Electric Company
Texas Gas Transmission Corporation
Toledo Edison Company
Union Electric Company
United Mine Workers of America, AFL-CIO
United States Environmental Protection Agency
Virginia Power
West Penn Power Company
West Texas Utilities Company
West Virginia Chamber of Commerce
State of West Virginia
Western Fuels Association
Wisconsin Electric Power Company

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GLOSSARY OF ABBREVIATIONS

ALA	American Lung Association
CAA	Clean Air Act
CASAC	Clean Air Scientific Advisory Committee
CD	Criteria Document
COPD	chronic obstructive pulmonary disease
EPA	Environmental Protection Agency
NAAQS	national ambient air quality standard
OSHA	Occupational Safety and Health Act
PM2.5	particles less than or equal to 2.5 microns in diameter
PM 10	particles less than or equal to 10 microns in diameter
PM	particulate matter
ppm	parts per million
RIA	Regulatory Impact Analysis
RTC	Response to Comments
SP	Staff Paper

CITATIONS TO DECISIONS ENTERED IN THE CASE

The decision of the court of appeals is published at *American Trucking Assns. v. USEPA*, 175 F.3d 1027 (D.C. Cir. 1999), App. 1,[1] *rehearing granted in part, denied in part*, 195 F.3d 4 (D.C. Cir. 1999), App. 64. The agency rules reviewed by the court of appeals are published at 62 Fed. Reg. 38652 (July 18, 1997), and 62 Fed. Reg. 38856 (July 18, 1997).

BASIS FOR JURISDICTION IN THIS COURT

The date the judgment or order sought to be reviewed was entered. The D.C. Circuit's judgment or order sought to be reviewed was entered on May 14, 1999, App. 1, and rehearing was granted in part and denied in part on October 29, 1999. App. 64.

The date of any order respecting rehearing. Rehearing was granted in part and denied in part on October 29, 1999. Rehearing en banc was denied that same date, with five of the nine participating judges voting for rehearing.

The statutory provision conferring certiorari jurisdiction on this Court. 28 U.S.C. § 1254.

[1] Appendix citations refer to the appendix filed by the Commonwealth of Massachusetts and the State of New Jersey with their petition for certiorari.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THIS CASE

Constitution. U.S. Const., Art. I, § 1.

Statutes. Clean Air Act §§ 108, 109, 172, and 181, 42 U.S.C. §§ 7408, 7409, 7502, and 7511.

Regulations. 40 C.F.R. §§ 50.7, 50.9 and 50.10.

(The full text of these provisions is set out in the appendix to the petition of the Commonwealth of Massachusetts and the State of New Jersey.)

STATEMENT OF THE CASE

Acting pursuant to its duty to set national ambient air quality standards (NAAQS) that "protect the public health" with "an adequate margin of safety," Clean Air Act § 109(b)(1), 42 U.S.C. § 7409(b)(1), the Environmental Protection Agency (EPA) has promulgated revised NAAQS for particulate matter (most importantly, for fine particles) and ozone. 62 Fed. Reg. 38711-12 (July 18, 1997), JA(PM) 61-62; 62 Fed. Reg. 38894-95 (July 18, 1997), JA(O) 39-40.[2] With respect to particulate matter, EPA estimates that 3,000-15,000 deaths, 6,000-10,000 hospital admissions for respiratory and cardiopulmonary causes, tens of thousands of cases of respiratory illness, and millions of days of missed work and restricted activity will be prevented each year just by *partial* attainment of

[2] In accordance with Rule 12.7, the present petition cites the joint appendices compiled in the court of appeals. The PM joint appendix is cited as JA(PM), and the ozone joint appendix as JA(O).

the new standards. Regulatory Impact Analysis (RIA) 12-43, JA(PM) 3486. With respect to ozone, EPA has estimated that its new standards will each year prevent tens of thousands of occurrences of health effects including respiratory symptoms (such as pain on breathing), reductions in lung function, and asthma attacks (including hospital admissions and emergency room visits). 62 Fed. Reg. 38865/2-3, JA(O) 10; *id.* 38868/1, JA(O) 13. It is these standards that the court of appeals has remanded.

Particulate matter. Particulate matter (PM) is a ubiquitous pollutant, consisting of fine particles produced largely by combustion or other high-temperature processes, and coarse particles mostly generated from mechanical processes through crushing and grinding. Criteria Document (CD) 3-145, JA(PM) 548; Staff Paper (SP) IV-3a, JA(PM) 1920. Over the years the public health significance of smaller particles has received increasing recognition. The original PM NAAQS promulgated in 1971 regulated particles up to 25 to 45 microns in diameter, 52 Fed. Reg. 24635/3 (July 1, 1987), JA(PM) 209, but EPA in 1987 promulgated revised NAAQS that addressed particles up to 10 microns in diameter ("PM10"). *Id.* 24663-64, JA(PM) 237-38. In 1997 EPA promulgated the PM NAAQS at issue here, which include a new NAAQS addressing "fine" particles, defined as those 2.5 microns in diameter or less. 40 C.F.R. § 50.7(a)(1).

These NAAQS were promulgated following a detailed and thorough review conducted by EPA pursuant to its statutory obligation to review and (as appropriate) revise NAAQS at no more than five-year intervals. CAA § 109(d). As required by the Act, EPA's review of the PM NAAQS involved presenting a comprehensive

review and assessment of the state of the science regarding particulate matter and its health and environmental effects in a "criteria" document, which was reviewed by a special scientific advisory committee (the Clean Air Scientific Advisory Committee, or CASAC). *See* CAA §§ 109(d); 108(a)(2). According to the final chapter of the Criteria Document, described by CASAC as the "best ever example of a true integrative summary of the state of knowledge about the health effects of airborne PM," Letter of March 15, 1996 from George T. Wolff to Carol M. Browner at 2, JA(PM) 3150,

> the extensive PM epidemiologic database that has evolved during the past several decades . . . includes recent studies providing evidence that serious health effects (mortality, exacerbation of chronic disease, increased hospital admissions, etc.) are associated with exposures to ambient levels of PM found in contemporary U.S. urban air sheds *even at concentrations below current U.S. PM standards.*

CD 13-1, JA(PM) 1779 (emphasis added). In sharp contrast to the "small" number of studies available in the 1987 PM review, 52 Fed. Reg. 24641/1, JA(PM) 215, and to other NAAQS reviews that have based standard-setting on a single study, 44 Fed. Reg. 8202/3 (February 8, 1979), JA(O) 3480 (noting that 1971 predecessor to the ozone standard was based on a single study), the studies relied on in the 1997 PM review include "over 80" addressing short-term exposures, of which "[o]ver 60 . . . have found consistent, positive, significant associations between short-term PM levels and mortality and morbidity endpoints." SP V-54, JA(PM) 2011. *Accord, id.* V-61a, JA(PM) 2026 (listing additional statistically significant studies

addressing long-term exposures). Significantly, when EPA plotted the results of the short-term exposure studies on a map, it concluded: "Although the highest PM-10 concentrations in the U.S. are in the West, most of the results in North America are from eastern communities, at PM-10 concentrations that are generally *below those permitted by the current standards.*" *Id.* front cover caption, JA(PM) 1900 (emphasis added).

As indicated, these PM-associated health effects include mortality, *i.e.*, death, largely from respiratory and cardiovascular causes. SP V-58, JA(PM) 2019. In addition, the studies documented associations between particulate matter and exacerbation of emphysema and chronic bronchitis (which collectively are known as "chronic obstructive pulmonary disease"),[3] as well as pneumonia and cardiovascular disease. *Id.* V-20, 21 and 32, JA(PM) 1974, 1976, and 1989. These exacerbations can be serious enough to lead the affected individuals to visit the emergency room, and to lead attending physicians to order that they be admitted to the hospital. CD 13-30, JA(PM) 1808. Persons specially at risk from these effects include those over 65 years of age, as well as those below that age who have acute or chronic respiratory disease and/or cardiovascular disease, or who are current or former smokers. CD 13-92 to 13-94, JA(PM) 1870-72.

Having noted these effects, EPA found that fine particles – which differ in size, chemical composition and origin from coarse particles, SP IV-4 to IV-8, JA(PM)

---

[3] COPD is "the most common pulmonary cause of death, the fourth leading cause of death overall, . . . and a major cause of disability." SP V-33, JA(PM) 1990.

1921-27 – were the appropriate indicator: "the fine particle studies consistently find positive, significant associations between fine particle levels and mortality and morbidity endpoints, with over 20 studies conducted in a number of geographic locations throughout the world, including the US, Canada, and Europe." SP V-76, JA(PM) 2047 (footnote omitted). Indeed, considering a study that compared the fine and coarse fractions, EPA found "clear evidence that fine particles are more likely to be responsible for the numerous observed associations between PM10 and mortality." SP V-64, JA(PM) 2031. *Accord, id.* V-67, JA(PM) 2037 (the 24-city study "provides clear evidence of an effect of fine particles that is independent of coarse fraction particles").

Considering these factors, and the near-unanimous recommendation of CASAC – including all four of the committee's epidemiologists – that a fine particle standard was warranted, Letter of June 13, 1996 from George T. Wolff to Carol M. Browner at Table 1, JA(PM) 3165, EPA opted to promulgate NAAQS for fine particles, measured as PM2.5. 62 Fed. Reg. 38711/3, JA(PM) 61 (setting annual standard at 15 μg/m3, and 24-hour standard at 65 μg/m3). The levels of the final standards are well within – indeed, "toward the middle portion of" – the range recommended by a majority of CASAC panelists. Response to Comments (RTC) 29, JA(PM) 268. EPA estimated that 3,000-15,000 deaths, 6,000-10,000 hospital admissions for respiratory and cardiopulmonary causes, tens of thousands of cases of respiratory illness, and millions of days of missed work and restricted activity will be prevented each year just by *partial* attainment of the new standards. RIA 12-43, JA(PM) 3486.

Ozone. Like particulate matter, ozone is a widespread pollutant occurring in numerous regions of the United States. The primary ingredient in what is known as "smog," it is formed when two precursor pollutants (volatile organic compounds and nitrogen oxides) react to sunlight. *American Petroleum Institute v. Costle*, 665 F.2d 1176, 1181 (D.C. Cir. 1981); H.R. Rep. No. 490, 101st Cong., 2d Sess. 202 (1990).

Prior to 1997, the ozone NAAQS had focused on short-term concentrations measured over a one-hour averaging time. 36 Fed. Reg. 8187/3 (April 30, 1971), JA(O) 3540 (setting NAAQS at 0.08 ppm averaged over one hour); 44 Fed. Reg. 8220/3 (February 8, 1979), JA(O) 3498 (setting NAAQS at 0.12 ppm averaged over one hour). Subsequently, concern was raised by CASAC and others that "even in areas which do not repeatedly exceed the ozone standard, ozone concentrations can remain close to 0.12 ppm for several hours per day for extended periods of time in summer. There was concern based on recent controlled human exposure, epidemiology and toxicology studies, that such prolonged exposures could result in increased respiratory impairment." 58 Fed. Reg. 13018/2 (March 9, 1993), JA(O) 3459.

Several years after CASAC's observation, having compiled a revised criteria document addressing these and other studies, EPA noted that human experimental data documented health effects resulting from 6- to 8-hour exposures to ozone levels as low as 0.08 ppm:

> Based on a significant body of information available since the last review, there is now *clear evidence* from *human clinical studies* that O3 effects of concern are associated with the 6- to

> 8-hour exposures tested. . . . This includes evidence of the following statistically significant responses at 6- to 8-hour exposures to the *lowest concentration evaluated, 0.08 ppm O3*, at moderate exertion: lung function decrements, respiratory symptoms (e.g., cough, pain on deep inspiration), nonspecific bronchial responsiveness, and biochemical indicators of pulmonary inflammation.

62 Fed. Reg. 38863-64, JA(O) 8-9 (emphasis added). *See also id.* 38872/1, JA(O) 17 ("the bulk of the human health effects evidence supporting a decision on an appropriate O3 standard is based on controlled human exposure studies that relate known O3 exposures directly to responses in individuals"); 38865/1, JA(O) 10 (noting that "field . . . and epidemiological studies" confirmed the results of the clinical studies: "effects were seen not only from controlled exposures to 0.08 ppm, but also in ambient environments in which 8-hour average O3 concentrations ranged from above to below the 0.08 ppm level").

Those most at risk from these effects are people who are active outdoors – *e.g.*, "active children and outdoor workers who regularly engage in outdoor activities." 62 Fed. Reg. 38859/3, JA(O) 4. In contrast to the studies underlying the prior NAAQS, which measured effects based on heavy exertion, the newer studies showed health effects under moderate exertion – a matter of concern because "[m]oderate exertion levels are more frequently experienced by individuals than heavy exertion levels." *Id.*

In addition to outdoor exertion, other factors increasing risk of harm from ozone exposure include respiratory

impairments such as asthma: "[t]he magnitude of individual changes can become more important in persons with impaired respiratory systems (e.g., asthmatics) who already have reduced baseline lung function." CD 9-26, JA(O) 1767. EPA heard vivid testimony concerning the effects of ozone on asthmatics:

> When I was four years old, I was playing outside on a really hot day and I started wheezing and my lungs started tightening up. So I came in and told my mom.
>
> We went to the doctor the next day and the doctor said I had asthma. The worst thing about having an asthma attack is that it almost feels like you are going to die because your lungs close up and it is really hard to breathe.
>
> The last two summers have been really bad for me. On days when the ozone is bad, I can't even go outside to play.

IV-F-84a at 168-69, JA(O) 3394-95 (ten-year-old Bethany Myles of Chicago).

> When there are ozone warnings, I can't be out of the air-conditioning. If I do go outside, I have an asthma attack. An asthma attack feels like I am suffocating. No one should have to feel this way.

Id. at 39, JA(O) 3389 (ten-year-old Jeff Damitz of Chicago). EPA estimated that twelve million Americans – one in twenty – are asthmatic. SP 39, JA(O) 1849.

Non-asthmatics likewise are at risk if they happen to be among those who are more sensitive to ozone: "[t]here is a large range of physiological responses among humans, with at least a 10-fold difference between the most and least responsive individuals." CD 9-4, JA(O)

1744. *See* McDonnell (1991), II-I-316, at 149, JA(O) 2775 (in laboratory study at 0.08 ppm, lung function decrements were as high as 37.9%); RTC 81 ¶ 5, JA(O) 161 (at 0.08 ppm, 10% of subjects had lung function decrements ≥20%). EPA heard testimony from these sensitive individuals as well:

> We had at least 26 days this summer of "unhealthful" ground level ozone under the ME [Maine] standard of .08 ppm. That's a big part of our summer, a very big part. This ground level ozone is a real problem, a serious problem.
>
> It's not just a statistical problem, either, because some standard was exceeded. I can feel it personally. I have exercised vigorously outside on "unhealthful" days and become physically sick – a funny nauseous feeling with a headache. I would go out and exercise at Ft. Williams Park and come home feeling queasy and think I had a bug. Before ozone warnings were given I would feel this sickness, and I began to associate it with hazy days, with how the air looked. Then after awhile I began to make associations with the way the air felt, then in the last few years I made the association with the ozone warnings. I have come home and told my wife how I felt and she has asked me if I checked the ozone level, and then I check it and realize the association. Now we are very aware of it. We can see it and feel it in the atmosphere without checking the DEP warnings. We know when it's more than .08. It's real and it's degrading our lives.

IV-F-102 at 1, JA(O) 3380 (Charles M. Sexton of South Portland, ME).

After considering the results of the studies, and the American Thoracic Society's criteria for defining which

health effects should be considered adverse, EPA concluded that "responses of some sensitive individuals [to 0.08 ppm] *are sufficiently severe and extended in duration to be considered adverse.*" 62 Fed. Reg. 38864/1, JA(O) 9 (emphasis added).

In addition to the human experimental data, EPA also noted that "[n]umerous epidemiological studies have reported excess hospital admissions and emergency department visits for respiratory causes (for asthmatic individuals and the general population) attributed primarily to ambient O3 exposures, *including O3 concentrations below the level of the current standard.*" *Id.* (emphasis added). As the Criteria Document noted, these studies "provide *strong evidence* that ambient exposures to O3 can cause *significant exacerbations of preexisting respiratory disease* in the general public at concentrations below 0.12 ppm O3." CD 7-171, JA(O) 1624 (emphasis added). EPA concluded that "increased hospital admissions and emergency room visits . . . are clearly adverse to individuals." 62 Fed. Reg. 38864/2, JA(O) 9.

In short, the evidence before EPA showed that health effects of concern (including adverse health effects) were occurring at levels allowed by the previous NAAQS, and at longer averaging times (6-8 hours, not just 1 hour). CASAC concluded that a new, 8-hour NAAQS was necessary: "It was . . . the consensus of the Panel that an 8-hour standard was more appropriate for a human health-based standard than a 1-hour standard." Letter of November 30, 1995 from George T. Wolff to Carol M. Browner at 2, JA(O) 237.

In acting on CASAC's consensus recommendation that an eight-hour NAAQS be set, EPA considered setting the level of the eight-hour standard at 0.09, which is the eight-hour level most comparable in protectiveness to the one-hour 0.12 ppm NAAQS. 61 Fed. Reg. 65725/2, JA(O) 51. Given the evidence documenting adverse health effects at levels allowed by the one-hour standard, EPA unsurprisingly rejected this option in favor of a more protective standard.

EPA presented the results of a risk assessment, which concluded that thousands more members of the group of greatest concern – children who are active outdoors – would suffer respiratory impairment and symptoms at a 0.09 ppm NAAQS than at a 0.08 ppm NAAQS. 62 Fed. Reg. 38865/2-3, JA(O) 10 (as compared to a 0.08 ppm NAAQS, a 0.09 ppm NAAQS would subject 70,000 more children to lung function decrements $\geq$15%, 39,000 more children to decrements $\geq$20%, and 14,000 more children to moderate or severe pain on deep inspiration). These figures applied only to nine urban areas, *id.* 38868/1 ¶ 2, JA(O) 13, and thus underestimate the number of ozone-induced effects that would occur nationwide.

The assessment also concluded that in New York City alone, a 0.09 ppm NAAQS would result in 40 more excess hospital admissions of asthmatics per ozone season than a 0.08 standard. *Id.* 38868/1, JA(O) 13. Even for that one city, this figure is "indicative of a pyramid of much larger numbers of related O3-induced effects, including respiratory-related hospital admissions among the general population, emergency and outpatient department visits, doctors visits, and asthma attacks and related increased

use of medication that are important public health considerations." *Id.*

EPA also considered other scientifically documented effects of 6- to 8-hour exposure to 0.08 ppm, including "increased nonspecific bronchial responsiveness (related, for example, to aggravation of asthma), decreased pulmonary defense mechanisms (suggestive of increased susceptibility to respiratory infection), and indicators of pulmonary inflammation (related to potential aggravation of chronic bronchitis or long-term damage to the lungs)." *Id.* 38868/1-2, JA(O) 13.

After weighing the evidence, EPA opted for an eight-hour standard at 0.08 ppm, a level consistent with the recommendations of CASAC. Letter of November 30, 1995 from George T. Wolff to Carol M. Browner at 3, JA(O) 238 (of ten panel members who expressed views, three favored 0.08 ppm, one endorsed a range of 0.08-0.09 ppm, and two endorsed the range presented by EPA (i.e., 0.07-0.09 ppm)). In responding to commenters who favored a 0.09 ppm standard because it would be equivalent to the 0.12 ppm one-hour standard, EPA noted that even at the chosen 0.08 ppm eight-hour level, "numerous controlled-exposure human studies have reported health effects such as lung function decrements, respiratory symptoms, and indicators of inflammation." RTC 13-14, JA(O) 93-94. *See also* 62 Fed. Reg. 38865/2-3, JA(O) 10 (even at a 0.08 ppm NAAQS, 180,000 children in the nine cities assessed would experience lung function decrements $\geq$15%, 58,000 would experience lung function decrements $\geq$20%, and 27,000 would experience moderate or severe pain on deep inspiration).

Proceedings Below. In the court below, industry and state petitioners challenged the NAAQS on a number of grounds in petitions for review under Clean Air Act § 307(b)(1), 42 U.S.C. § 7607(b)(1). The court did not in any way question the validity of the science relied upon by EPA concerning either PM or ozone, and on the contrary found that EPA's decision to set a fine particulate standard "easily" satisfied the statutory standard. App. 51. "Given EPA's statutory mandate to establish standards based on 'the latest scientific knowledge,' 42 U.S.C. §§ 7408(a)(2), 7409(d), the growing empirical evidence demonstrating a relationship between fine particle pollution and adverse health effects amply justifies establishment of new fine particle standards." *Id.*

Nonetheless, the court of appeals held that the Clean Air Act, and EPA's interpretation of it, violate the nondelegation doctrine. App. 12. The court interpreted the requirement that Congress provide an "intelligible principle," *see, e.g., J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928), as demanding a "*determinate* criterion for drawing lines." App. 5 (emphasis added). The court remanded for EPA to articulate such a criterion. App. 12-13, 53. Subsequently, five of nine participating judges voted to grant en banc rehearing. App. 84. Because two active judges did not participate in the vote, however, the five fell short of constituting a majority of active judges of the circuit, and en banc rehearing was denied.

In addition, in a ruling directed expressly to ozone, the court called into question EPA's authority to implement the new eight-hour ozone NAAQS. App. 29-40. This

ruling was modified, but not withdrawn, on rehearing. App. 73-75.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS A PUBLIC HEALTH ISSUE OF THE FOREMOST IMPORTANCE.

This Court has recognized that the 1970 Clean Air Act, which enacted the § 109(b)(1) mandate to set NAAQS that "protect the public health" with "an adequate margin of safety," responded to "threats to public health [that] were regarded as urgent." *General Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). The Court has detailed the disappointing pre-1970 attempts at air pollution control that led Congress to this step. *Train v. Natural Resources Defense Council*, 421 U.S. 60, 64 (1975) (under the pre-1970 Act, "the States generally retained wide latitude to determine both the air quality standards which they would meet and the period of time in which they would do so;" the response of the States was "disappointing" and brought "little progress;" "Congress reacted by taking a stick to the States in the form of the Clean Air Amendments of 1970," which "sharply increased federal authority and responsibility in the continuing effort to combat air pollution.").

Three decades after Congress took this urgent step, the promise embodied in the 1970 legislation – "the promise that ambient air in all parts of the country shall have no adverse effects upon any American's health," 116 Cong. Rec. 42381/2 (December 18, 1970) (remarks of Senator Muskie, floor manager of the conference agreement)

– remains unrealized. Persistent unhealthy levels of PM and ozone are the most important reason for that continuing failure. No other pollutants come close to these in the number of deaths, illnesses, and other adverse effects caused.

For over ten years, the American Lung Association – and many other concerned organizations and individuals, including many scientists, physicians, and public health professionals – have worked to combat this problem by advocating the adoption of more protective NAAQS. As the record of this proceeding abundantly documents, the pre-existing NAAQS are simply not adequate to the task of protecting public health. At pollution levels allowed by those NAAQS, large numbers of people are dying, being driven to the hospital, and suffering pain and discomfort – all for the simple act of breathing the air.

Compared with their predecessors, the fine particle and ozone NAAQS remanded by the court of appeals represent a major step forward towards control of this pollution. Currently, many millions of people are exposed to harmful levels of pollution, yet live in areas where the pre-existing PM and ozone NAAQS are met. P. 5, *supra* (most studies finding adverse health effects were from eastern U.S., where PM concentrations meet the pre-existing NAAQS); 62 Fed. Reg. 38868/2, JA(O) 13 ("approximately 46 million more people, including approximately 13 million more children and 3 million more individuals with asthma, live in areas that would not attain a 0.08 ppm standard compared to a 0.09 ppm standard"); 61 Fed. Reg. 65725/2, JA(O) 51 (0.09 ppm standard is the

eight-hour level most equivalent to the pre-existing one-hour NAAQS).

EPA's new NAAQS will extend much-needed protection to these many people, as well as ensuring that clean-up activities in areas currently violating the pre-existing NAAQS will prevent more adverse health effects. The prospect is striking: the new NAAQS are expected to prevent thousands of deaths and hospital admissions each year, as well as tens of thousands of cases of respiratory illness and millions of days of missed work and restricted activity. Pp. 6, 12-13, *supra*.

The court of appeals decision will at best greatly delay and at worst outright prevent these public health benefits from being realized, and will condemn millions of Americans to continued exposure to harmful air pollution associated with premature death, hospital admissions, and other adverse health effects. To prevent this result, this Court should grant certiorari.

Moreover, the court of appeals' interpretation of the nondelegation doctrine threatens to sweep far beyond the specific regulations at issue here. Under the court's rationale, a "determinate criterion" may now be demanded for a variety of regulations, including regulations addressing topics other than health or the environment. To prevent this unwarranted expansion of nondelegation doctrine, the Court should grant certiorari.

II. THE COURT OF APPEALS' NONDELEGATION RULING CONFLICTS WITH PRIOR RULINGS OF THIS COURT, AS WELL AS OF AT LEAST ONE OTHER CIRCUIT.

The core of the court of appeals' nondelegation ruling is the assertion that a delegation must be limited by a "determinate criterion" in order to pass constitutional muster. App. 5. This assertion conflicts with the precedent of this Court, which requires only an "intelligible principle," not a determinate criterion – and which has upheld delegations under thoroughly non-determinate standards such as the "public interest." App. 54-55 (dissenting opinion of Judge Tatel cites cases). As Justice Scalia observed: "What legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a 'public interest' standard?" *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (agreeing with majority's conclusion that the Sentencing Reform Act set forth intelligible standards).

Under this caselaw, the specific standards in the Clean Air Act (App. 56-57 (Judge Tatel's dissenting opinion discusses standards prescribed by Clean Air Act §§ 108 and 109)) easily pass muster. Moreover, these standards are supplemented by legislative history providing additional guidance concerning congressional intent – *e.g.*, that NAAQS must protect sensitive individuals, must protect against adverse effects, and must be preventive. S. Rep. No. 1196, 91st Cong., 2d Sess. 10 (1970); H. R. Rep. No. 294, 95th Cong., 1st Sess. 49-51 (1977). *See Lead Industries Assn. v. EPA*, 647 F.2d 1130, 1152, 1155 n.50 (D.C. Cir. 1980) (noting that legislative history of Clean Air Act

provides guidance concerning the congressional intent underlying § 109); *Mistretta*, 488 U.S. at 376 n.10 (legislative history and statutory text together "provide a factual background and statutory context that give content to the mandate of the Commission").

Moreover, the standard adopted by the plurality in *Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607 (1980) ("*Benzene*") to avoid a possible nondelegation issue – "significant risk" – is likewise nondeterminate. As the plurality itself made clear, there is no formula for determining what risks are "significant." *Benzene*, 448 U.S. at 655-56 (significant risk standard "is not a mathematical straitjacket," and "cannot be based solely on a resolution of the facts," but "will be based largely on policy considerations;" the agency "is free to use conservative assumptions in interpreting the data," "risking error on the side of overprotection rather than underprotection").

Indeed, the court of appeals' nondelegation ruling conflicts even with the dissenting opinion of Justice Rehnquist, the lone vote in *Benzene* for a finding of excessive delegation. As Justice Rehnquist noted, it was the *feasibility* requirement in the Occupational Safety and Health Act that led him to that vote: "the insertion into § 6(b)(5) of the words 'to the extent feasible' rendered what had been a clear, if somewhat unrealistic, statute into one so vague and precatory as to be an unconstitutional delegation." *American Textile Mfrs. Institute v. Donovan*, 452 U.S. 490, 545 (1981) (Rehnquist, J., dissenting, and explaining his vote in *Benzene*). By contrast, the bill as introduced contained no feasibility provision:

> Prior to the inclusion of the "feasibility" language, § 6(b)(5) simply required the Secretary to "set the standard which most adequately assures, on the basis of the best available professional evidence, that no employee will suffer any impairment of health. . . ." Had that statute been enacted, it would undoubtedly support the result the Court reaches in these cases, and it would not have created an excessive delegation problem. The Secretary of Labor would quite clearly have been authorized to set exposure standards *without regard to any kind of cost-benefit analysis*.

Id. (emphasis added). The Clean Air Act, like the original OSHA bill that never became law, requires standards to be based on health "without regard to any kind of cost-benefit analysis." *See* App. 13. Accordingly, even under the strong version of the nondelegation doctrine espoused by Chief Justice Rehnquist, the Act would pass muster.

In addition to the conflict with this Court's nondelegation cases, the court of appeals' insistence on a determinate criterion conflicts with the seminal case of *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Under *Chevron* Step Two, which applies where Congress has "delegat[ed]" to an agency authority to interpret a statute, the reviewing court must uphold the agency interpretation if it is "reasonable." *Id.* 843-44. *Chevron* Step Two necessarily presupposes that Congress may lawfully write statutes that are ambiguous and therefore subject to differing interpretations – indeed, diametrically opposing ones. *Id.* 863 ("The fact that the agency has from time to time changed its interpretation

of the term 'source' does not . . . lead us to conclude that no deference should be accorded the agency's interpretation of the statute."). Indeed, *Chevron* expressly acknowledged that it is proper for Congress to punt issues to agencies, rather than resolving them itself. *Id.* 865-66 (administrative agency can properly "resolv[e] the competing interests which Congress itself either inadvertently did not resolve, or *intentionally left to be resolved by the agency* charged with the administration of the statute") (emphasis added). In demanding a "determinate criterion," the court of appeals would take away Congress' rightful prerogative to delegate.

Finally, in addition to the conflicts with precedent of this Court, the court of appeals' decision conflicts with precedent of the First Circuit, upholding against nondelegation challenge a broad statutory delegation of authority to EPA to define "hazardous waste." *United States v. Henry*, 136 F.3d 12, 16-17 (1st Cir. 1998).

III. THE COURT OF APPEALS' RULING CONCERNING IMPLEMENTATION OF THE OZONE NAAQS PRESENTS AN IMPORTANT QUESTION THAT WAS ERRONEOUSLY DECIDED BELOW, AND SHOULD BE REVIEWED BY THIS COURT.

Once NAAQS are set, the Act requires that areas where air quality violates the NAAQS be designated as nonattainment areas, and that specified steps be taken to bring those areas into attainment. The Act prescribes generic provisions concerning nonattainment areas in Subpart 1 of Part D (§§ 171-179B, 42 U.S.C. §§ 7501-7509a), supplemented by pollutant-specific provisions in

Subparts 2-5 (§§ 181-192, 42 U.S.C. §§ 7511-7514a). The ozone-specific program in Subpart 2 (§§ 181-185B, 42 U.S.C. §§ 7511-7511f) is based on the pre-existing ozone NAAQS (which was set at 0.12 parts per million, averaged over one hour), App. 29-30, while Subpart 1 applies generically to any NAAQS (including any revised NAAQS). 172(a)(1)(A), 42 U.S.C. § 7502(a)(1)(A).

The court of appeals correctly held that the ozone-specific program set forth in Subpart 2 does not preclude EPA either from promulgating a revised ozone NAAQS, or from issuing nonattainment area designations under that NAAQS. App. 31-34. The court incorrectly held, however, that "EPA can enforce a revised primary ozone NAAQS only in conformity with Subpart 2." App. 75. *See also* App. 31 ("EPA is precluded from enforcing a revised primary ozone NAAQS other than in accordance with the classifications, attainment dates, and control measures set out in Subpart 2.").

A. The Court of Appeals' Subpart 2 Ruling Creates Uncertainty Concerning EPA's Authority to Implement the New Eight-Hour Ozone NAAQS.

The court of appeals' Subpart 2 ruling creates uncertainty concerning EPA's authority to implement the new eight-hour ozone NAAQS. That uncertainty is amply illustrated by statements of Judge Tatel, a member of the court of appeals panel that issued the ruling. Citing language in the court's opinion, Judge Tatel interpreted that

language to mean that areas meeting the pre-existing ozone NAAQS are "completely exempt from any ozone regulation whatsoever," App. 77 – even if they are violating the new eight-hour NAAQS.[4]

This reading of the court's opinion raises serious concerns for public health. Tens of millions of Americans live in areas with air pollution which – though meeting the pre-existing one-hour NAAQS – violates the new eight-hour NAAQS. *See* pp. 16-17, *supra*. It is crucial that these individuals enjoy the benefits of pollution control measures pursuant to the new eight-hour NAAQS. Moreover, millions of Americans live in areas that currently violate the pre-existing one-hour NAAQS. 40 C.F.R. Part 81 (listing areas where one-hour NAAQS is violated, including Los Angeles, Houston, Chicago, Washington, D.C., Baltimore, Philadelphia and New York, among others). In such areas, it is crucial that pollution control programs reduce ozone pollution sufficiently to meet the new eight-hour standard – and that these areas not be held exempt from further pollution reductions once they attain the one-hour standard.

Despite Judge Tatel's concerns about the implications of the court of appeals' decision, he nonetheless joined in the court's disposition of this issue, because he concluded that the court's decision (as amended upon rehearing) "*leaves open the possibility* that the new ozone standard can be implemented in areas that have attained the old standard." App. 81 (emphasis added). ALA also believes that

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[4] The language cited by Judge Tatel was not altered on rehearing.

the better reading of the court of appeals' amended decision is that it leaves open this possibility. But because the new ozone NAAQS is a crucial regulation affecting areas inhabited by tens of millions, pp. 16-17, *supra* (tens of millions of Americans live in areas with air quality that meets the pre-existing one-hour NAAQS but violates the new eight-hour NAAQS), this question should not be left to "possibilit[ies]." Rather, the Court should review this issue, and ensure that implementation of the new NAAQS does not become mired in litigation that further delays – and possibly prevents – achievement of the healthy air quality that Congress mandated three decades ago.

B. The Court of Appeals' Subpart 2 Ruling Is Erroneous.

The court of appeals' holding that the classifications, attainment dates, and control measures of Subpart 2 apply to the new eight-hour NAAQS contravenes the Act. By their express terms, the classification provisions of Subpart 1 apply to "*any* revised standard, *including a revision of any standard in effect on November 15, 1990*," § 172(a)(1)(A), 42 U.S.C. § 7502(a)(1)(A) (emphasis added), and the attainment date provisions track that applicability. *Id.* (providing that classification under § 172(a)(1) is *inter alia* "for the purpose of applying an attainment date pursuant to paragraph (2)" – *i.e.*, pursuant to § 172(a)(2)).

The court of appeals concluded that these Subpart 1 provisions were ousted by §§ 172(a)(1)(C) and (a)(2)(D),

which provide that the § 172(a) classifications and attainment dates do not apply to nonattainment areas for which classifications and attainment dates "are specifically provided under other provisions of this part." The court found that these ouster provisions apply to the new eight-hour NAAQS, basing this finding on the court's conclusion that § 181(a)(1) provides classifications and attainment dates for all ozone nonattainment areas. App. 34-35.

This conclusion is erroneous. By its terms, § 181(a)(1) contains no classifications or attainment dates for any area with an ozone "design value" less than 0.121 – a level roughly approximating the level of the pre-existing one-hour NAAQS. App. 29-30. Thus, § 181(a)(1) offers no classifications or attainment dates for the numerous areas where air quality meets the pre-existing one-hour NAAQS, yet violates the new eight-hour NAAQS.

For areas with design values greater than or equal to 0.121, § 181(a)(1) provides classifications and attainment dates – but only for the pre-existing one-hour NAAQS, not for the new eight-hour NAAQS. Applying the § 181(a)(1) classifications and attainment dates to the new eight-hour NAAQS would produce absurd results – specifically, many areas would be assigned attainment dates *before the July 1997 promulgation of the new NAAQS*. For example, areas classified as marginal under the new NAAQS would be required to attain by November 15, 1993, and areas classified as moderate would be required to attain by November 15, 1996. 181(a)(1) (table 1). A reading that results in an attainment date for a NAAQS that antedates the very existence of that NAAQS cannot possibly be a valid interpretation of the Act.

Finally, the court of appeals erred by ruling (App. 31) that the new eight-hour NAAQS must be enforced only in accordance with the "control measures" of Subpart 2. Indeed, the court did not even point to a statutory provision that allegedly ousted the Subpart 1 provisions concerning control measures.

No such provision exists: § 172(b), which requires states to submit pollution control plans implementing new NAAQS no later than "3 years from the date of the nonattainment designation," contains no ouster provision comparable to § 172(a)(1)(C) or (a)(2)(D). Nor is such an ouster provision contained in § 172(c), which sets forth nine specific requirements that a control plan must meet – including the requirement that the plan "provide for attainment of the national primary ambient air quality standards." § 172(c)(1).

In short, the court of appeals' ruling is erroneous, and raises questions concerning EPA's authority to implement the new NAAQS. Given the importance of that NAAQS to reducing pollution exposures in areas where tens of millions of Americans live, this Court should grant certiorari on this issue.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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Respectfully submitted,

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